DOCUMENT RESUME

ED 150 780 EC 103 887

AUTHOR Bourne, Richard; Newberger, Eli H.
TITLE "Family Autonomy" or "Coercive Intervention"? Ambiguity and Conflict in the Proposed Standards for Child Abuse and Neglect.
PUB DATE Jul 77
NOTE 39p.; Footnotes may be marginally legible due to type size; Reprinted from Boston University Law Review, v57 n4, July 1977

EDRS PRICE MF-$0.83 HC-$2.06 Plus Postage.
DESCRIPTORS *Child Abuse; Court Litigation; Government Role; *Intervention; *Neglected Children; *Social Services; *Standards; *State Action

ABSTRACT

Criticized are standards for child abuse and neglect drafted by the Juvenile Justice Standards Project of the Institute of Judicial Administration and the American Bar Association. It is claimed that the standards unduly limit state intervention. Case study examples are cited and revisions are suggested for the following areas: providing services in cases of nonserious harm, the future endangerment requirment, court jurisdiction to order removal for serious harm, and the reporting process. (CL)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

"Family Autonomy" or "Coercive Intervention"? Ambiguity and Conflict in the Proposed Standards for Child Abuse and Neglect

U S DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

By
RICHARD BOURNE
and
ELI H. NEWBERGER

Reprinted from the
BOSTON UNIVERSITY LAW REVIEW
Volume 57, Number 4, July 1977

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Eli H. Newberger

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) AND USERS OF THE ERIC SYSTEM."

"FAMILY AUTONOMY" OR "COERCIVE INTERVENTION"? AMBIGUITY AND CONFLICT IN THE PROPOSED STANDARDS FOR CHILD ABUSE AND NEGLECT

RICHARD BOURNE*
ELI H. NEWBERGER**

I. INTRODUCTION

Perhaps the strongest and most universal human feeling is the love of a parent for his or her child. Not surprisingly, reaction to the tragedy of a child harmed in the home is equally strong and universal. More subtle, however, is the ambivalent nature of that reaction.[1] Shared notions of parental love and care are deeply offended by a parent who appears not to want his child. The public is puzzled by the parent who loves his child but nevertheless intentionally harms him or fails to protect the child from harm. Public outrage has led the state to intervene in dangerous family situations to guarantee the child's safety. However, American society regards the relationship between parent and child as so precious and so beneficial to the child's growth that the family is protected against all unnecessary state intervention. The specter of unjustified state intrusion into or destruction of this relationship affronts fundamental notions of parenthood.

This ambivalence toward state intervention in harmful family situations clearly influenced the drafters of the *Standards Relating to Abuse and Neglect* (Standards), promulgated by the Juvenile Justice Standards Project of the Institute of Judicial Administration and the American Bar Association.[2] The drafters attempted to accommodate both protection of the child and family independence in the design of every provision of the Standards' comprehensive scheme for state intervention. The Standards suggest model substantive and procedural law concerning reporting of child

---

* Attorney, Trauma-X Group, Children's Hospital Medical Center, Boston, Massachusetts; Assistant Professor of Sociology, Northeastern University, Boston, Massachusetts. Ph.D., Harvard University, 1973 (sociology); J.D., Boston University School of Law, 1974.

** Director, Family Development Study, Children's Hospital Medical Center, Boston, Massachusetts; Assistant Professor of Pediatrics, Harvard Medical School, Boston, Massachusetts. M.D., Yale School of Medicine, 1966; M.S., Harvard School of Public Health, 1972. Partial support for this research was provided by a grant from the Office of Child Development, Department of Health, Education & Welfare, Washington, D.C. (Project OCD-CB-141).

[1] *Cf.* J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 106 (1973). Public responses to a survey evinced this contradictory reaction: 36 percent of those surveyed favored removal of the child after the first incident of abuse, 53.9 percent of those surveyed favored nonremoval to give the parent a second chance. D. Gil, Violence Against Children 65 (1973).

[2] Institute of Judicial Administration & American Bar Association, Joint Commission on Juvenile Justice Standards, Standards Relating to Abuse and Neglect (tent. ed. 1977) (R. Burt & M. Wald, Reporters) [hereinafter cited as IJA/ABA Standards].

abuse,[3] emergency temporary custody of endangered children,[4] court-ordered provision of services within the home, removal of a child,[5] criminal prosecution of parents,[6] and voluntary placement of an endangered child.[7] The drafters fashioned the scheme upon three basic principles that underlie the central dilemma of state intervention: deference to parental autonomy, the paramount nature of the child's interests when in conflict with the parents', and the limitation upon state intervention to remedy only specific harms.

The first principle announced in the Standards codifies a reverence for the family into "a strong presumption for parental autonomy in child rearing."[8] Parental autonomy refers not only to the maintenance of the family unit but also to the insulation from state interference of all parental decisions regarding child management.[9] One purpose of the presumption is to safeguard the parent's traditional right to care, custody and control of his child.[10] Fundamentally, however, the Standards insist upon deference to parental control because it "is most likely to lead to decisions that help children."[11] The Standards assume that a child is most apt to thrive in the custody of those who have cared for him since birth.[12] The bonds of that relationship frequently cannot be fully duplicated by a court-ordered substitute.[13] Thus, the Standards urge proper legal recognition[14] of this long-standing assumption of child development scholarship and practice.[15]

The Standards also acknowledge that deference to parental autonomy

---

[3] IJA/ABA Standards pt. III.
[4] *Id.* pt. IV.
[5] *Id.* pts. II, V-VIII.
[6] *Id.* pt. IX.
[7] *Id.* pt. X.
[8] *Id.* pt. 1.1.
[9] Indeed, the Standards refuse to mandate affirmative duties of child care. Instead, the Standards specify only those harms that parents must not cause or permit. Thus, the child has no right to an "ideal" family that will furnish the best opportunity for growth. *See* IJA/ABA Standards, Commentary, pt. I, at 37, 38, 42; *id.*, Commentary, pt. 2.1, at 49 [hereinafter cited as Commentary]. In fact, under the Standards, the child's rights to adequate care and protection are realized only when the parents have committed gross acts of abuse or neglect. *Contra*, IJA/ABA Standards 182 (Nuernberger, dissenting). *See generally* S. Katz, When Parents Fail 55-57 (1971); Fraser, The Child and His Parents: A Delicate Balance of Rights, *in* Child Abuse and Neglect: The Family and the Community 324-29 (R. Helfer & C. Kempe eds. 1976). The Standards refuse to go any further because of a lack of consensus on what constitutes adequate child care and a fear that any consensus would ignore healthy cultural biases. IJA/ABA Standards pt. 1.4; Commentary 44.
[10] *See* Stanley v. Illinois, 405 U.S. 645, 658 (1972); Prince v. Massachusetts, 321 U.S. 158, 170 (1944); Fraser, *supra* note 9, at 326.
[11] IJA/ABA Standards, Introduction at 3.
[12] In some cases, this may not be the "biological parent" but rather the "psychological parent." J. Goldstein, A. Freud & A. Solnit, *supra* note 1, at 19.
[13] *See* J. Bowlby, Child Care and the Growth of Love 8 (2d ed. 1965); Burt, Developing Constitutional Rights of, in and for Children, 39 Law & Contemp. Prob. 118, 127 (1975).
[14] For a list of state statutes explicitly adopting this preference for the home, see Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 Law & Contemp. Prob. 226, 243 n.83 (1975).
[15] *See* A. Kadushin, Child Welfare Services 257 (2d ed. 1974); S. Katz, *supra* note 9, at 52.

may not always be in a particular child's best interests. In that case, the Standards expressly commit the state to protection of the child despite the resulting destruction of and intrusion upon the parent's right to care, custody and control.[16] Thus, the Standards continue the role of the state as *parens patriae*.[17] The commentary to the Standards reiterates the traditional justification that the child's comparatively helpless condition warrants state intervention and protection.[18] In addition, intervention may disrupt the cycle of the abused or neglected child's becoming the abusing or neglecting parent.[19]

The Standards' most innovative precept is the general restriction of the court's power to intervene to only those cases in which the child has suffered *specific* harm.[20] In the past, courts have intervened based upon highly subjective judgments concerning parental unfitness or unpleasant home conditions without any showing that this behavior or these conditions resulted in specific harm to the child.[21] The Standards reflect the widespread disapproval of such overreaching by experts[22] and appellate courts.[23] In effect, the Standards have established a per se rule that the presumption in favor of parental autonomy is rebutted only by a showing of specific harm to the child.

Although these principles provide a sound theoretical basis for a scheme of state intervention, their accommodation and practical application in the Standards are sometimes unsatisfactory. In this article, we will set forth both our criticisms of the present provisions and our suggested revisions. Generally, we conclude that the Standards continually fail to refine the scheme to reflect the different degrees of intrusion upon parental autonomy caused by reporting, court-ordered provision of services in the home and removal. We suggest that legislatures considering reform in child protection laws modify the Standards in order to increase the availability of less intrusive means of state intervention. Accordingly, we believe that the grounds for reporting and for court-ordered provision of services should be significantly expanded. Our experience indicates that the prophylactic and therapeutic nature of early, limited intervention can minimize the instances in which a child must be removed from his parents.[24]

---

[16] IJA/ABA Standards pt. 1.5; *accord*, J. Goldstein, A Freud & A. Solnit, *supra* note 1, at 7.

[17] *See* S. Katz, *supra* note 9, at 4; Mnookin, Foster Care: In Whose Best Interest?, 43 Harv. Ed. Rev. 599, 603 (1973).

[18] Commentary 45.

[19] *Id.*; J. Goldstein, A. Freud & A. Solnit, *supra* note 1, at 7.

[20] IJA/ABA Standards pt. 1.2.

[21] Commentary 38-39.

[22] *See, e.g.*, J. Bowlby, *supra* note 13, at 85.

[23] *See, e.g.*, *In re* Roya, 255 Cal. App. 2d 260, 267-68, 63 Cal. Rptr. 252, 256-57 (Ct. App. 1967); *In re* Cager, 251 Md. 473, 479, 284 A.2d 384, 388 (1968); State v. Geer, 311 S.W.2d 49, 52 (Mo. Ct. App. 1958).

[24] *See* Burt & Balyeat, A New System for Improving the Care of Neglected and Abused Children, 53 Child Welfare 167 (1974); Newberger, Hagenbuch, Ebeling, Colligan, Sheehan & McVeigh, Reducing the Liberal and Human Cost of Child Abuse: Impact of a New Hospital Management System, 51 Pediatrics 840 (1973).

Our criticism generates from our work at Children's Hospital Medical Center in Boston with children who suffer from abuse or neglect as a result of their parents' problems. Our concern in this article will focus upon the impact of the proposed model not only upon children and parents but also upon the professionals who work with them. Throughout the article, we have drawn specific cases from our clinical experience to illustrate the painful choices professionals must make and the inadequacies of the present and proposed systems of child protection.

II. A Grant of Jurisdiction to Order Services

Despite our agreement with the Standards' three basic tenets—deference to parental autonomy, the paramount nature of the child's interests, and the limitation upon state intervention to cases involving specific harm—we fundamentally disagree with the Standards' undifferentiating distrust of all unrequested state intervention into the family.[35] To minimize state intervention, the Standards limit court jurisdiction to only those cases involving *serious* harm to a child.[36] Thus, a flat ban is imposed upon intervention in cases of *nonserious* harm. Moreover, this jurisdictional grant operates without regard to the nature of the intervention sought; it applies equally to courts' power to order removal of the child from the parents and to the power to order less intrusive and potentially less destructive dispositions, such as homemaker services or therapy. To obtain any intervention, the petitioner must show by clear and convincing evidence that the child is "endangered";[37] the child must have suffered, or "there is a substantial risk that the child will imminently suffer, physical harm causing disfigurement, impairment of bodily functioning, or other serious physical injury,"[38] or the child must be suffering "serious emotional damage."[39] Additionally, the petitioner must convincingly demonstrate that intervention is necessary to protect the child from future endangerment.[40] Thus, the same grave level of harm that would justify the removal of a child constitutes the exclusive occasion for all unrequested state intervention.

Two aspects of this jurisdictional scheme are objectionable. First, we disagree with the flat ban upon intervention for nonserious harm. Second, we disagree with the Standards' failure to distinguish between removal and court-ordered provision of services in the threshold requirements for state intervention.[41] Both provisions ignore the difference between the intrusive and potentially harmful effects of removal and the less drastic effects of providing services in the home. Moreover, inherent in this jurisdictional grant is a negative appraisal of the value of services. In

[35] IJA/ABA Standards 184 (Polier, dissenting).
[36] *Id.* pt. 2.1.
[37] *Id.*
[38] *Id.* pt. 2.1(B); *accord, id.* pts. 2.1(A) & (E).
[39] *Id.* pt. 2.1(C).
[40] *Id.* pt. 2.2.
[41] *See id.* at 181 (Nuernberger, dissenting).

denying jurisdiction over cases involving nonserious harm, the Standards have adopted a per se rule that the benefits of services never outweigh the intrusion upon parental autonomy and the risk of harm from intervention.[33] In specifying the prima facie requirements for state intervention in cases of serious harm, the Standards give equal weight to the intrusive effects of the removal of a child from his parents and the unrequested provision of social services.

We urge major revision of this jurisdiction provision. Jurisdiction should be divided into two separate categories: the first, to order services; the second, to order removal.[33] To establish jurisdiction to order services, the petitioner should have to show by clear and convincing evidence that the child has suffered or will imminently suffer physical or emotional harm, serious or nonserious.[34] Once this requirement is satisfied, the burden of proof concerning future harm should shift to the parents. The parents, assisted by counsel, would have to demonstrate that, because future harm is unlikely, intervention is unnecessary. Moreover, we suggest that, if the evidence concerning future harm is inconclusive, the court should be given discretion to consider the therapeutic value of services, presently impermissible under the Standards.

A. *Providing Services in Cases of Nonserious Harm*

The family situation in which a child suffers nonserious harm is not only not "ideal,"[35] it is quite oppressive, albeit without danger to life and limb of the child. The child will consistently suffer specific, demonstrable physical or emotional harm, even though such harm does not rise to the gravity required by the Standards nor present a "substantial risk that the child will imminently suffer" such severe harm. An example of parental abuse constituting nonserious harm would be a child who regularly receives painful bruises in the course of parental discipline.[36] Nonserious harm attributable to parental neglect would include some "failure to thrive" cases.[37] Commentary accompanying the Standards suggests that court intervention would be permissible if the child suffered "severe malnutrition, extremely low physical growth rate, delayed bone maturation, and significant retardation of motor development."[38] By implication,

---

[33] *See* Commentary 38, 43.

[33] One of the co-reporters for the Standards, Professor Robert Burt, has similarly suggested that adjudication and disposition alternatives should not be considered separately. *See* Burt, Forcing Protection on Children and Their Parents: The Impact of *Wyman v. James*, 69 Mich. L. Rev. 1259, 1286 (1971).

[34] *See* Daly, Willful Child Abuse and State Reporting Statutes, 23 U. Miami L. Rev. 285, 318, 343 (1969) (favors reporting of nonserious harm).

[35] Commentary 49.

[36] *Id.* at 53-54. Recent data has shown that, of reported incidents of physical injuries allegedly caused by abuse, 51.3 percent were considered minor and only 2.4 percent constituted major physical abuse. American Humane Ass'n, National Study on Child Neglect and Abuse Reporting 4 (1977).

[37] *See generally* Sussman, Reporting Child Abuse: A Review of the Literature, 8 Fam. L.Q. 245, 268 (1974).

[38] Commentary 55.

less extreme manifestations of the same or similar symptoms of "failure to thrive" would be outside the court's jurisdiction unless those agencies seeking intervention could prove that more severe harms were imminent.

The Standards' ban upon provision of services in cases of nonserious harm represents one instance of the Standards' deference to the right of parents to rear their children free from state intervention. Several assumptions underlie the prohibition. First, the Standards assume that a meaningful distinction can be made between voluntary and coercive state intervention in abuse and neglect cases. Second, it is assumed that, because parents of children suffering nonserious harm can voluntarily request services, some of these children will be helped. Finally, the Standards assume that coercive provision of services to families in which the child has suffered nonserious harm is more often harmful than beneficial.

1. Voluntary Versus Coercive Intervention

The Standards' reliance upon the distinction between a parent's voluntary request for services and state-coerced intervention is unsound because the distinction is often meaningless or blurred in the context of neglect and abuse cases. An apparently voluntary request, in reality, may be a product of external pressures.[39] For example, the parents may make a "voluntary" request for services because their welfare worker has either expressly or impliedly conditioned continued benefits upon such a request.[40] Conversely, parents may loudly protest intervention while simultaneously making indirect pleas for help.[41] Resistance and denial of guilt are typical reactions of parents when confronted by a social worker's allegations.[42] Yet clinical experience indicates that a parent who harms his child has ambivalent feelings.[43] He wants to hide from the shame and stigma but also wants to stop his abuse or neglect.[44] He is often actually relieved when state authorities have finally concerned themselves with the family's difficulties.[45]

For example, a mother brought her daughter, aged three, to Children's Hospital Medical Center with multiple broken ribs and leg fractures. The

---

[39] Based on clinical experience, some experts have suggested that the parent's voluntary acceptance of intervention may actually represent an unhealthy submissiveness manifested as a psychiatric ego defense. Steele & Pollock, A Psychiatric Study of Parents Who Abuse Infants and Small Children, *in* The Battered Child 125 (2d ed. R. Helfer & C. Kempe 1974).

[40] *See* Commentary 167; Levine, *Caveat Parens*: A Demystification of the Child Protection System, 35 U. Pitt. L. Rev. 1, 11-13 (1973).

[41] Parents rarely make direct, voluntary requests. Alexander, The Social Worker and the Family, *in* Helping the Battered Child and His Family 22-23 (C. Kempe & R. Helfer eds. 1972); DeFrancis, Child Protection—A Comprehensive Coordinated Process, Fourth National Symposium on Child Abuse, October, 1973, at 8 (The American Humane Ass'n, Children's Div. 1975).

[42] *See* Steele & Pollock, *supra* note 39, at 125.

[43] Davoren, The Role of the Social Worker, *in* The Battered Child, *supra* note 39, at 138, 144.

[44] A. Kadushin, *supra* note 15, at 242.

[45] *Id.* at 251, 265, *quoting* C. Hancock, Digest of a Study of Protective Services and the Problem of Neglect of Children in New Jersey 8 (1958).

mother denied that the injuries were intentionally inflicted and, instead, claimed that they had resulted from her daughter's accidental fall from a bed onto a concrete floor. However, based upon x-rays that revealed varying ages of the fractures, the physicians concluded that the mother's explanation of the cause was inadequate. The mother persisted in her denials and offered arguments and proof in support of her explanation. She displayed a health clinic schedule card to verify that she had taken the child for examinations every few months since birth. She maintained that her evident concern for the child's medical care was inconsistent with a desire to harm her child. She further insisted that the presence of old injuries was impossible because no physician had brought any injuries to her attention at the prior exams. Because of the perceived risk to the child, the Hospital initiated a care and protection petition in juvenile court. Shortly thereafter, the mother admitted her long-term physical abuse of her child. She stated that, for the first time, she was able to verbalize a need for help. Evidently, the petition had provided the structure necessary for such communication. In addition, she explained that her frequent visits to medical clinics had, in fact, been an unstated search for detection and support. Thus, despite her vigorous denials and her failure to request help prior to the court action, the mother apparently desired intervention. However, under the Standards, if this mother had caused only nonserious harm, the Hospital and the court would be forced to ignore urgent but indirectly expressed needs of the family. This case illustrates an additional fallacy in the Standards' distinction between voluntary and coercive intervention. In cases of nonserious harm, the Standards condition the provision of services upon an express request by the parent and forbid any court action. However, in this case, court action was the necessary precondition for the mother's expression of need.

Even if the parent does try to obtain assistance by express request, our experience indicates that this request may go unheeded.[48] For example, a thirteen-month-old infant from a middle-class family was diagnosed by professionals at Children's Hospital as severely retarded with slim developmental prospects. The infant's mother revealed that she was so embarrassed by the infant's condition that she kept him in a back room of the house. She also expressed homicidal tendencies toward the infant. She told the professional staff that, while on a boating excursion with the family, she had held the baby over the side and had actually considered letting go. She sought a voluntary placement of the child through the Department of Public Welfare but was told that no placements were available. Similarly, the Department of Mental Health refused to assist her. Thus, the Hospital physician and protective service social worker

[48] *Accord*, IJA/ABA Standards 185 (Polier, dissenting); Polier & McDonald, The Family Court in an Urban Setting, *in* Helping the Battered Child and His Family, *supra* note 41, at 208, 221; Terr & Watson, The Battered Child Rebrutalized: Two Cases of Medical-Legal Confusion, 124 Am. J. Psych. 1452, 1458 (1968); Wald, State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 Stan. L. Rev. 985, 1000 (1975).

were forced to file a care and protection petition in court. Attorneys on behalf of both state agencies argued in court against the petition. Nevertheless, the court granted the petition and placed the child in a hospital for retarded children.

This case starkly illustrates the present practice of both private and public agencies of refusing to expend precious resources unless a court mandates the provision of services.[47] Frequently, the agency will even request a court order simply to justify expenditures to a budget manager. The commentary to the Standards notes, with disapproval, that some state statutes condition financial aid on court supervision of the child. The authors lament the fact that the availability of public housing, for example, will often turn on the issuance of a court order.[48]

Yet, despite this express condemnation, the Standards implicitly give legal sanction to this practice. Because of the scarcity of social services, the Standards effectively legislate their exclusive distribution to cases of serious harm. The commentary justifies the narrow scope of state intervention on the ground that it will channel services to the cases of greatest need and, thus, maximize their effectiveness.[49] However, the Standards and the commentary fail to recognize that, as a result, provision of services at the request of a parent who has caused only nonserious harm may be nothing more than a comforting fiction.[50]

The scarcity of services is further aggravated by the new procedural burdens the Standards impose upon agencies. Under the present draft, a single agency could be called upon to perform an initial investigation of a report of abuse[51] and, if court action ensues, the agency must submit an investigative plan, conduct a detailed investigation, analyze the services available and their possible impact, and submit specific treatment or placement plans and periodic post-disposition reports.[52] Moreover, agency personnel may be required to attend hearings at as many as four stages of the initial proceedings,[53] as well as at periodic reviews of agency provision of services or placement.[54] These procedures are designed to make the agency more accountable to courts.[55] The net result, however, is

[47] Additionally, experts state that the social worker may resist dealing with the abusive side of the parent/patient. Holmes, Barnhart, Cantoni & Reymer, Working with the Parent in Child-Abuse Cases, 56 Social Casework 3, 5-6 (1975). This refusal based on the social worker's own make-up suggests another reason why a court order may be a prerequisite for provision of services.

[48] Commentary 54-55.

[49] IJA/ABA Standards, Introduction at 4; Commentary 43.

[50] The Standards' assumption that services will be provided on a voluntary basis is clear. IJA/ABA Standards pt. 1.1; Commentary 38, 43. In situations in which the services of social workers are in fact only available through court intervention, one distinguished commentator urged early intervention. Paulsen, Law and Abused Children, *in* The Battered Child, *supra* note 39, at 153, 169.

[51] IJA/ABA Standards pt. 3.3(A).

[52] *Id.* pts. 5.2(C), (F), 6.2, 6.5, 7.1.

[53] *Id.* pt. 5.2 (authorization of investigation); *id.* pt. 5.2(C) (approval of investigation plan); *id.* pt. 5.3 (report); *id.* pt. 6.1 (disposition).

[54] *Id.* pt. 7.1.

[55] *Id.* pt. 1.8; Commentary 47.

to so burden the agency that it will be less capable of offering quality services to needy families than it is at present. Unfortunately, the scarcity of services puts even more pressure on both the agency and the court to select less time-consuming, less thoughtful treatment options. For example, the simplicity of removal, although often more costly to the state in the long run,[56] will be more attractive in cases of serious harm than the protracted provision of treatment in the home.[57] Because the processing of each case will exhaust judicial and agency time, the drafters of the Standards evidently felt compelled to narrow the scope of courts' jurisdiction.

The wisdom of drafting the Standards predicated upon the unfortunate present reality of scarce resources[58] is questionable;[59] rather, the Standards should provide for court-ordered services to all families who could benefit from such assistance without regard to the degree of harm or present agency budgets. It would then be incumbent upon any state legislature enacting the Standards into law also to guarantee adequate funding to meet the new state intervention scheme. However, the present draft actually reduces the pressure upon legislatures to expand social service agency budgets to meet the needs and express requests of families.

The Standards' assumption that a sharp distinction exists between voluntary and coercive state intervention underlies the ban upon the provision of services in cases of nonserious harm. Yet our experience indicates that the presence or absence of an express request rarely reflects parents' feelings toward state intrusion into their homes. More importantly, when coupled with the Standards' increased procedural requirements on agencies, the ban may result in the elimination of any assistance to nonseriously harmed children; on the one hand, agencies cannot initiate court action, but, on the other, they often will not expend resources without court approval.

2. The Value of Unrequested Assistance

By conditioning assistance in the home upon parental request, the Standards replace an evaluation of the value of the services to the child and family with an inquiry into whether the parent has requested the state intrusion. If the parent has not waived his right to autonomy, the nonseriously harmed child will be denied access to services.[60] This arrangement appears contrary to the express commitment of the Standards to

---

[56] Select Comm. on Child Abuse, N.Y. State Assembly, Report, April 1972, *reprinted in* The Battered Child, *supra* note 39, at 229, 246 (app. c).

[57] DeFrancis, *supra* note 41, at 13.

[58] *See generally* DeFrancis, The Status of Child Protective Services, A National Dilemma, *in* Helping the Battered Child and His Family, *supra* note 41, at 127, 131-36.

[59] IJA/ABA Standards 184 (Polier, dissenting). *Contra*, Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 625, 642 (1976) (supporting "realist's" approach).

[60] *See* IJA/ABA Standards 186 (Polier, dissenting) ("benign neglect" by state).

protect the child's needs in any conflict of interests between parent and child.[61] Additionally, it seems contrary to the Standards' commitment to "strengthen family life"[62] because state-ordered assistance to the family is eliminated. The Standards negate these criticisms by minimizing the value of unrequested assistance. In most cases, court-ordered provision of services to families in which the child has suffered only nonserious harm is assumed not to be in the child's best interests. The commentary suggests that such intervention, at best, would be minimally helpful and, in fact, could even be harmful to the child.[63] The Standards apparently conclude that any minor benefits are outweighed by the loss of parental autonomy.

In another forum, a reporter on the Standards, Professor Michael Wald, has elaborated the bases for this conclusion.[64] He suggests that the effectiveness of any assistance may be significantly reduced if provided on a coercive, as opposed to voluntary, basis. Among the potential dangers of assistance cited, mandatory day care, for example, might weaken the close attachment between parents and child crucial to healthy development. However, as Professor Wald acknowledges, this attachment may already be weak in harmful family situations.[65] Professor Wald also distinguishes between the value of "hard" and "soft" services. He admits that provision of "hard" services—financial aid, medical care and homemakers—would be helpful but adds that such assistance is not usually forthcoming.[66] However, he notes that the effectiveness of the more common "soft" services—such as counseling and parent education—has been disproven.[67] Moreover, Professor Wald maintains that such services can often be harmful if the social worker is inept or injects his middle-class bias into the decisions regarding child care and housekeeping. He fears that the social worker's intervention may result in inconsistent parental behavior that will confuse the child and disturb the child's adjustment to the unhealthy situation. In addition, he postulates that the parent may direct his resentment of the intervention toward the child as the cause of the intrusion.

Studies measuring the effectiveness of services have produced inconclusive results. Some studies have drawn negative conclusions;[68] others, positive.[69] Furthermore, it is generally agreed that measuring the out-

[61] *Id.* pt. 1.5.

[62] *Id.*

[63] Commentary 42-43.

[64] Wald, *supra* note 46, at 996-1000. The author expressly disclaims that the views expressed there are those of the Juvenile Justice Standards Commission. *Id.* at 985.

[65] *Id.* at 996-97.

[66] *Id.* at 999.

[67] *Id.* at 998 n.73.

[68] *See, e.g.*, N. Polansky & N. Polansky, The Current Status of Child Abuse and Child Neglect in this Country, Report to the Joint Comm'n on Mental Health for Children (1968), *quoted in* D. Gil, *supra* note 1, at 43-47; The Multi-Problem Dilemma: A Social Research Demonstration with Multi-Problem Families (G. Brown ed. 1968); Fischer, Is Casework Effective? A Review, 18 Social Work 5 (1973); Geismar, Implications of a Family Life Improvement Project, 52 Social Casework 455 (1971).

[69] *See, e.g.*, A. Kadushin, *supra* note 15, at 106-15, 269-71; 2 S. White, Federal Programs

come of services on an objective scale is very difficult.[70] It is particularly difficult to design research projects to measure significant improvements in family behavior. Because the Standards maintain the presumption in favor of parental autonomy, failure to prove that services will improve the family situation is dispositive against intervention.[71] This conclusion ignores that the presumption has, to some extent, been rebutted by proof that the parent has caused harm, although not serious. Significantly, Professor Wald has failed to cite studies supporting his thesis that the effectiveness of services turns on whether they are provided on a voluntary or coercive basis.[72] In fact, the intervention of legal authority can enhance a parent's respect for the treatment program and thus increase its effectiveness.[73]

Our experience has been that services provided on an involuntary basis can be helpful. For example, a mother brought her eleven-year-old daughter to Children's Hospital and reported that the child had told her that the father had masturbated in front of the daughter and invited her into his bed. In addition, the mother revealed that three months earlier, fearing her husband's temper, she had fled home and left the child behind with the father. The child denied having mentioned her father's sexual advances. Emergency room physicians were unable or unwilling to make a thorough medical examination because of the child's uncooperativeness and anxiety. The child was admitted for "social reasons" to permit a further evaluation of the family situation and the child's needs. A psychological consultation and social service interview revealed that the child had recently lost bladder and bowel control at night, performed poorly in school, experienced nightmares, gained excessive weight and become increasingly tense. The conclusion drawn from this initial evaluation was that the child was "troubled," even though no clear evidence of serious emotional damage emerged. However, the diagnostic team interpreted the facts that she spoke of a "secret" with her father and mentioned that he had brought her candy during school recess as soft signs of possible sexual abuse. The mother desired help for her daughter but seemed incapable of obtaining assistance herself. She did not know what services were available nor how to use them. However, she did not wish to leave her child in the Hospital for the time required to conduct a full psychiatric examination. Once she even attempted to remove the youngster because of her own fears and loneliness. When the father was inter-

for Young Children: Review and Recommendations 275-76 (1973); Burt & Balyeat, *supra* note 24; Morse, Hyde, Newberger & Reed, Environmental Correlates of Pediatric Social Illness: Preventive Implications of an Advocacy Approach, 67 Am. J. Pub. Health 612 (1977); Newberger, Hagenbuch, Ebeling, Colligan, Sheehan & McVeigh, *supra* note 24; Steele & Pollock, *supra* note 39, at 131.

[70] *See* Wald, *supra* note 46, at 978 n.73.

[71] *See* Burt, *supra* note 13, at 127-28; *cf.* Wald, *supra* note 46, at 999 n.86.

[72] Professor Wald even concedes that social services are successful despite initial hostility. Wald, *supra* note 59, at 658.

[73] Polansky, DeSaix & Sharlin, Child Neglect: Understanding and Reaching the Parent 58 (1972).

viewed, he denied that any problems existed and expressed strong hostility toward his wife and the Hospital personnel. The Hospital staff attempted, without success, to involve various child protection agencies. The agencies all refused because they either were overcrowded or considered the case "inappropriate." The Trauma-X Group at Children's Hospital—a multi-disciplinary team for treatment of neglect and abuse crises—decided to seek court intervention in this case. At the preliminary hearing, the judge entered a temporary order granting physical custody of the child to a treatment center to conduct further evaluation. The center began diagnosis and therapy and also enrolled the child in a special education program. The mother began weekly counseling with a psychiatric social worker from the same facility. The father, after a court-ordered psychiatric evaluation, agreed to seek help for his depression and drinking problem. Thereafter, the mother and father resumed living together.

This petition would not satisfy either of the relevant grounds for court intervention proposed by the Standards. The commentary indicates that intervention is authorized only when the sexual abuse constitutes a violation of the state penal code.[74] The only hard evidence at the time of the petition had related to the father's exhibitionism and propositions at home, which alone might not constitute criminal violations. The Standards also permit the court to intervene when the child is presently suffering "serious emotional damage."[75] The Trauma-X Group had sought court action before the development of strong manifestations of serious emotional harm because of legitimate concerns about the child's mental status and the adequacy of the mother's caretaking. Additionally, the Group had hoped that early action could prevent the need to remove the child in the future. Although the court would have been forced to dismiss the petition under the Standards, in the actual case the entire family very clearly benefited from the court's intervention. This case and the case of the mother who admitted her abuse only after the court petition was filed also illustrate the therapeutic value of court action itself. In both cases, the court action was the catalyst or vehicle enabling the parents to confront their problems.

Professor Wald's segregation of "hard" and "soft" services, and his respective approval and disapproval, ignores the evolving clinical model

---

[74] Commentary 60.

[75] IJA/ABA Standards pt. 2.1(C). The Standards further define the specific manifestations constituting serious harm as "severe anxiety, depression, or withdrawal, or untoward aggressive behavior toward self or others." We share one expert's hesitancy to freeze the definition into a statute because of the present state of our knowledge about development. S. Katz, *supra* note 9, at 68. In addition, as the commentary also suggests, the definition must be read in the context of the different stages of development at different ages. Commentary 57. However, fixing specific attributes in the statute may produce static rather than developmental interpretations. For example, courts working with the definition may ignore the fact that what constitutes "untoward aggressive behavior" at one age may be quite normal at another.

and practice of a combined approach to treatment.[76] Based upon evidence indicating that external stress is substantially related to neglect, abuse and other pediatric social illnesses, the treatment of families now focuses upon relieving the external stresses of inadequate housing, health and child care by directly supplying these needs. However, equally important components of this new treatment include "soft" services, such as counseling and education, specifically designed to enable parents to secure resources in the future. A systematic study measuring the effectiveness of this combined approach has not been undertaken. However, the data demonstrating the connection between these external stresses and the incidence of neglect and abuse warrant the inference that treatment directed at relieving these stresses can effectively prevent individual cases of future neglect and abuse and can improve the family's ability to utilize services for the child. Our clinical experience supports this conclusion.[77] Obviously, success on an individual level cannot substitute for efforts to change institutions and correct the inadequacy of resources that affect large numbers of the population.

The fact that this and other novel approaches may not yet be prevalent does not support the narrow grounds for court-ordered services adopted by the Standards. The criticism that was previously leveled with regard to limiting these grounds based upon the present dismal quantity of services applies equally when based upon the present *quality* of services. If enlightened treatment methods would benefit a troubled family, the Standards should permit a court to order such assistance.[78] Concomitantly, professionals must pressure agencies and state legislatures to improve the quality of services through training in modern approaches to treatment of child neglect and abuse. The Standards themselves could be drafted to promote such new approaches to treatment. For example, the Standards could establish citizen-based councils to place continuing pressure on professional groups, agencies and legislatures to increase the quality, as well as quantity, of services.[79] These councils could supply the input of local values, traditions, needs and priorities into the design of treatment models.[80] In addition, the Standards could establish a mechanism to coordinate state departments of child health, mental health, welfare services[81] and employment opportunities for the parents.[82] Through this

---

[76] *See generally* Newberger & Hyde, Child Abuse, Principles and Implications of Current Pediatric Practice, 22 Pediatric Clinics of North America 695 (1975); Newberger, Hagenbuch, Ebeling, Colligan, Sheehan & McVeigh, *supra* note 24.

[77] Morse, Hyde, Newberger & Reed, *supra* note 69.

[78] *Cf.* Burt, *supra* note 33, at 1285.

[79] *See* Select Comm. on Child Abuse, N.Y. State Assembly, *supra* note 56, at 251-52; Edelman, The Massachusetts Task Force Reports: Advocacy for Children, 43 Harv. Ed. Rev. 639 (1973).

[80] *See* D. Gil, *supra* note 1, at 147; DeFrancis, *supra* note 58, at 138-39; Holmes, Barnhart, Cantoni & Reymer, *supra* note 47, at 12. *See generally* Joint Comm'n on the Mental Health of Children, Crisis in Child Mental Health; Challenge for the 1970's, at 9-21 (1970).

[81] *See* Newberger, Newberger & Richmond, Child Health in America: Toward a Rational Public Policy, 54 Milbank Memorial Fund Q./Health & Soc'y 249 (1976).

coordinating mechanism, the Standards would further the goal of a coherent, embracive approach to family problems.[83]

Were we to agree with the Standards' assumption that most nonseriously harmed children are not benefited by court-ordered provision of services, we would nevertheless be unable to support the flat ban upon state intervention. To prohibit all intervention and thus deny assistance to even those children who could be helped does not seem to us the proper resolution of the conflicting interests. The acknowledged trade-off in adopting the ban on intervention for nonserious harm is that cases that warrant intervention must be dismissed in order to prevent unjustified or unproductive intrusions upon parental control in other cases.[84] We are unconvinced that judicial discretion has been so unwisely exercised in the past. Moreover, the instances of useless or harmful intrusions will be reduced by the Standards' limitation upon intervention to cases of specific harm. Courts can thus ensure that the services ordered will closely relate to the nature of the specific harm.[85] Finally, rather than abandoning any attempt to aid the nonseriously harmed child, legislatures should consider proposals, in addition to those suggested in this article, to improve the quality and availability of services.[86]

B. *The Future Endangerment Requirement*

1. Initial Intervention

According to the present draft of the Standards, once a petitioner seeking court intervention has established that a child is "endangered," the petitioner must satisfy the second requirement—demonstrate that intervention is necessary to protect against future endangerment.[87] This requirement applies equally to both services and removal. Objections to this jurisdictional requirement are threefold. First, as in the initial requirement of "endangerment," the petitioner must satisfy the same burden of proof regardless of which disposition is sought. Second, because the likelihood of future harm and the impact of intervention are difficult to prove, placing the burden of proof on the petitioner may be tantamount in many cases to a denial of court jurisdiction. Third, the Standards expressly reject the more discretionary "best interests of the child" test in favor of considering a determination regarding only the

---

[83] *See* National Research Council, National Academy of Sciences, Toward a National Policy for Children and Families (1976).

[83] Another reason for broadened court intervention to effectuate the coordinated approach to treatment has been suggested by clinicians. Terr & Watson, *supra* note 46, at 1439.

[84] IJA/ABA Standards, Introduction at 6; Commentary 50; *cf.* S. Katz, *supra* note 9, at 63-67.

[85] D. Gil, *supra* note 1, at 5-6; S. Katz, *supra* note 9, at 64.

[86] IJA/ABA Standards 185-86 (Polier, dissenting).

[87] *Id.* pt. 2.2. In part 5.3(E)(2), the Standards place the burden on the petitioner to prove by clear and convincing evidence allegations sufficient to support the petition. Presumably, this includes the jurisdictional requirement of future endangerment.

prophylactic value of intervention. This latter test, however, excludes a relevant inquiry into the therapeutic value of court-ordered services.

Distinguishing between services and removal is most appropriate in the context of the "necessity of intervention" jurisdictional requirement. Because court-ordered services involve much less drastic interference with the parent-child relationship and much less stigma for the parents than removal, the restraint on court intervention should be significantly less when services are the only disposition requested by the petitioner. Furthermore, services and removal are different in kind, not just in degree. Services most typically involve direct provision of medical care or better housing, training in homemaking techniques, or counseling aimed at emotional and behavioral improvements.[88] These services are directed toward benefiting the entire family. Admittedly, removal sometimes will be accompanied by services to the parents in an effort to reunite the family.[89] However, in general, the curative aspects of removal are less significant than its intrusive effects. Removal is a decision to save the child at the expense of the parents' right to custody. Thus, a distinction between services and removal will be particularly appropriate if the court's jurisdictional inquiry is expanded to include consideration of the therapeutic value of intervention.

The Standards limit the court's inquiry to whether intervention is necessary to prevent future harm. This test, which replaces the prevailing "best interests of the child" test, would guide a court's decision whether[90] and in what manner it should intervene.[91] The drafters of the Standards rejected the prevalent test to avoid the guesswork inherent in its application. For example, in a removal case, the application of the "best interests" test requires a judge to compare the probable consequences of removal with several alternative programs of assistance in the home. The judge's comparative analysis must be based upon predictions about future behavior of each family member in a number of contexts. The judge must also predict the progress the child would make in a foster home. Judicial officers and the adjudication process are particularly ill-suited to make such uncertain predictions about human development.[92] Uncertainty offers opportunities for the court's bias to replace proper criteria.[93] Addi-

---

[88] *See* Commentary 117-19.

[89] *Id.* 119.

[90] *See* Mnookin, *supra* note 17, at 614, 627-28.

[91] The commentary discusses the replacement of the "best interests" test at the dispositional phase. Commentary 120. However, for both jurisdiction and disposition, the Standards substitute similar tests of the necessity of intervention to protect against future harm. IJA/ABA Standards pts. 2.2 & 6.4. Thus, discussion of the substitution of the "best interests" test is equally appropriate at the jurisdictional phase. For a citation of the states that have adopted the "best interests" test for dispositions in their statutes or case law, see Mnookin, *supra* note 14, at 243 n.81.

[92] Commentary 121-22; Mnookin, *supra* note 14, at 249-62; Mnookin, *supra* note 17, at 613-22.

[93] Commentary 121; Mnookin, *supra* note 14, at 269.

tionally, when the judgment is, by nature, subject to reasonable differences, appellate court control of the juvenile court becomes minimal.[94]

The Standards' suggested inquiry into the prophylactic value of intervention does not completely avoid the uncertainty inherent in the "best interests" test. The court must still judge the likelihood of future harm based upon predictions about parental behavior. Nevertheless, conditioning intervention on a likelihood of future harm is generally sound. Obviously, if future harm is clearly improbable, a court should not intervene despite a record of past harm; for example, the mother of the injured child may permanently separate from the abusing lover. Theoretically, the presumption in favor of parental autonomy may warrant placing the burden of proof of the likelihood of future harm on the petitioner. However, the petitioner must initially establish in the majority of cases that harm has occurred and, thus, will have rebutted any presumption of parental fitness. In reality, a presumption of future harm arises from past harm because of the nature of child abuse and neglect.[95] A typical pattern of abuse involves a continuing series of assaults, escalating in severity.[96] Neglect is an even more obvious case of a chronic condition.[97] Moreover, placing the burden on the petitioner to show by clear and convincing evidence that intervention is necessary to prevent future harm would effectively preclude intervention in many cases.[98] Because predictive judgments by nature are rarely conclusive, the degree of certainty required by the "clear and convincing evidence" standard of proof may be unattainable.[99]

For the reasons outlined above, we suggest that, in cases in which only court-ordered services are sought, the future endangerment requirement be revised. Once the petitioner has convincingly demonstrated that the child is endangered, the burden of proof concerning future harm should be shifted to the parents. Consistent with the actual nature of child abuse and neglect, the parents, assisted by their attorney, should be required to demonstrate that continuation of the harm is unlikely. Placing the burden of this issue upon the parents is particularly appropriate because the likelihood of future harm entails predictions concerning parental behavior.[100] However, we do not suggest that the parents be required to satisfy

---

[94] Mnookin, *supra* note 14, at 253-54.

[95] *See* Commentary 63.

[96] D. Gil, *supra* note 1, at 113; Child Abuse and Neglect Project Educ. Comm'n of the States, National Center for the Prevention and Treatment of Child Abuse and Neglect, Child Abuse and Neglect: Model Legislation for the States 2 (1976); *see* Weston, The Pathology of Child Abuse, *in* The Battered Child, *supra* note 39, at 79-85.

[97] *Cf.* Koel, Failure to Thrive and Fatal Injury as a Continuum, 118 Am. J. Diseases of Children 51 (1969).

[98] *Cf.* Wald, *supra* note 46, at 1010 n.137.

[99] *See* Commentary 113 (similar problems of proof constitute basis for rejecting "beyond a reasonable doubt standard").

[100] Although the language of the Standards would support denying jurisdiction unless the petitioner satisfies the burden of proof, the commentary implies a shift of the burden to the parents. Commentary 63-64. The commentary lists examples of when a child may have

the burdensome clear and convincing standard. Rather, in those cases in which evidence concerning future harm is inconclusive, courts should have discretion to expand the inquiry and consider the therapeutic value of services.[101]

In practice, professionals often do not agree on the likelihood of future harm in a particular case but do agree that intervention is warranted. For example, a mother brought her four-month-old daughter to the Hospital, complaining that the child's leg appeared misshapen. An examination revealed a congenital hip deformity. The infant underwent surgery to correct the deformity and had to wear a body cast to allow proper healing. Upon observation of the interaction between mother and daughter in the Hospital, personnel became concerned about the mother's ability to care for the child. The mother occasionally left the bars of the crib down and had difficulty keeping the cast clean. She seemed unable to feed the infant properly and to adjust the frame her daughter required for support. The staff's concern increased because, despite instruction and gentle warning, the mother's behavior did not change after several weeks. In an interview with a social worker, the mother seemed depressed. She denied that she was having difficulty caring for her infant and explained that she needed her daughter because she was "all alone." When the social worker suggested that a home health aide might be helpful after the infant was discharged, the mother protested that she did not want or need any assistance. During the interview, the mother revealed that she had had a poor relationship with her own mother and had been neglected in her childhood. Some members of the Trauma-X Group believed that the infant's need for special care, the mother's inadequate caretaking and her refusal to voluntarily accept assistance placed the child "at risk." While these members advocated court intervention to keep the child out of the home, other members wanted to give the mother a chance to prove herself outside the Hospital. They suggested that the infant could safely be discharged if the Hospital could monitor the child's condition by frequent outpatient visits and if the mother would accept instruction in proper care techniques by a visiting nurse. Although the mother's inattention or

---

suffered a specific, serious harm but, nonetheless, intervention is unnecessary to prevent future harm. First, when the abuse represented an isolated moment of anger, future incidents are not as likely. Second, a court should deny jurisdiction when the family situation has undergone material, long-term alteration since the time the petition was filed. For example, the parent's failure to supervise the child while the parent was at work may have been corrected by the provision of day care services on a voluntary basis. Third, when intervention may do more harm than good, the court should not proceed. In effect, the commentary offers examples of instances in which the parents would be able to satisfy the burden of proof that intervention is unnecessary. The fact that the information required by these examples is more likely within the parents' knowledge provides further reason for placing the burden upon the parents.

[101] The commentary's third example of when not to intervene despite a showing of "endangerment"—when intervention may do more harm than good—suggests that inquiry into therapeutic value is appropriate. As an illustration, the commentary refers to a case of sexual abuse in which there is no evidence that future abuse is likely, the counseling resources are limited and the family seems to be handling the problem adequately. *Id.* at 64.

carelessness might result in serious injury to the child, no one on the team felt completely comfortable with that prediction. Nevertheless, the entire team advocated intervention based upon shared doubts about the mother's ability to cope with the particular medical problems of the child.

This example suggests the proper criteria by which a court should determine whether to order services. Absent clear evidence that future harm is or is not likely, a court should consider, in addition to the probabilities of future harm, whether the specific services proposed are directed toward and are likely to remedy the particular problem that gave rise to the endangerment and whether the services are beneficial to the family. In the example, the mother's inability to handle the child's treatment gave rise to the endangerment. Services directed toward training and supervising her in the proper care of the child's condition could prevent any future harm that might otherwise occur. Moreover, training in the treatment required by the child's particular condition, as well as in feeding, hygiene and safety generally, could benefit the entire family and improve both the mother's self-image and her relationship with her daughter.

An inquiry into the general therapeutic value of services alone is subject to criticisms similar to those directed at the "best interests of the child" test. Admittedly, a court can find some general benefits in almost any proposed service. Accordingly, we would narrowly limit the court's discretion to consider therapeutic value. A broader inquiry into the therapeutic value of services is triggered only after the petitioner has established a case of endangerment, and then only if the parents' proof that future endangerment is unlikely is insufficient. Moreover, general therapeutic value alone would never be sufficient to justify intervention; proof of specific remedial efforts with regard to the particular endangering problem must be required.

2. Termination of Services

The Standards mandate review every six months regarding "whether the conditions still exist that required initial intervention."[102] Unless the conditions still exist, the court must terminate jurisdiction. If the parents state at the six-month hearing that intervention is no longer necessary, the agency must demonstrate a need to continue.[103] Moreover, at the end of eighteen months of court supervision, the court must terminate jurisdiction unless "there is clear and convincing evidence that the child is still endangered or would be endangered if services were withdrawn."[104] This call for careful, periodic review of the necessity for intervention will help prevent continuances that are based upon perfunctory hearings or that result from forgetfulness of the court or agency.[105] However, by condi-

[102] IJA/ABA Standards pt. 7.4(A).
[103] Commentary 141.
[104] IJA/ABA Standards pt. 7.4(C).
[105] *See id.* pt. 7.1; Commentary 136.

tioning assistance beyond eighteen months upon "clear proof" of a necessarily uncertain prediction, court jurisdiction may often end before the family situation has stabilized.

The termination provisions retain the unfortunate, narrow focus of the jurisdictional grant for initial intervention. In doing so, the Standards fail to distinguish between the significantly different potential harms caused by initial and continuing intervention. The benefits of continued services in the home will more often outweigh the intrusive effects. The benefits of services often multiply over time as relationships with social workers are strengthened and initial hostility is overcome. As parents develop confidence in their child-caring abilities, their progress will advance more rapidly. Moreover, the intrusive effect of continued supervision is not a multiple of the harm to parental autonomy caused by the initial intervention. The initial outside intervention into the home causes the stigma and most severely undermines parental authority over the child. This shift in the balance justifies a broadened inquiry into the therapeutic value of continued intervention. In fact, therapeutic value is entitled to more weight in the context of termination than was appropriate in the decision whether to intervene initially. Although no intrusion should continue longer than necessary, the determination of necessity in termination hearings should not turn solely upon proof by the intruding party that the child will suffer physical or emotional harm. The mere fact that a child will not be reinjured at the particular moment does not suggest that the family no longer requires judicial monitoring or social welfare intervention. Once the court intervention has begun, jurisdiction should continue until the family can no longer benefit from support and until they have confronted basic problems.[106] In effect, we suggest that the goal of continuing intervention is broader than that of initial intervention. Initial intervention should be primarily, although not exclusively, directed toward protecting against future harm. After the initial intrusion has occurred, continued intervention should be directed toward giving the family the tools to deal with their problems in the remote as well as in the immediate future. Unfortunately, the commentary specifically rejects this broader purpose; the court is directed to continue services only if necessary to protect the child and not solely because services are "useful."[107]

We also disagree with the timing of court review under the Standards. In our clinical experience, we have found that eighteen months is insufficient to cement short-term prophylactic gains into long-term prophylactic and therapeutic benefits for the entire family.[108] For exam-

---

[106] *See* Pollock & Steele, A Therapeutic Approach to the Parents, *in* Helping the Battered Child and His Family, *supra* note 41, at 20.

[107] Commentary 141.

[108] *See* Pollock & Steele, *supra* note 106; Roth, A Practice Regimen for Diagnosis and Treatment of Child Abuse, 54 Child Welfare 268, 273 (1975). *See also* Kempe & Helfer, Innovative Therapeutic Approaches, *in* Helping the Battered Child and His Family, *supra* note 41, at 46 (success of treatment by visiting nurses never realized before eighth or ninth month).

ple, the clinic at Children's Hospital examined a girl, aged five, for gross developmental delays and scattered bruises. Her mother had seemed anxious and depressed. Her father had acknowledged enormous rage at his daughter and uncontrollable impulses to harm her. Pursuant to statutory mandate, the Hospital filed a child abuse case report. The report effected neither change in the family's behavior nor advancement in the child's developmental progress. New bruises were evident upon subsequent examinations. The Hospital filed a court complaint, requesting that physical custody remain with the parents while the state was acting to acquire legal custody. The Hospital staff hoped that court supervision would assure that the parents would follow through with a treatment program designed to resolve many of the family conflicts that had apparently culminated in the father's anger toward his child. The court granted the petition. Now, two years after the initial hearing, the parents participate—although somewhat reluctantly—in a family treatment program in the local court clinic. The father receives regular doses of a major tranquilizer. There have been no further incidents of injury to the child. The daughter is making excellent developmental progress with the support of a specially designed academic program. Without court monitoring and services, family decompensation and reinjury might well occur. Moreover, the parents probably would not voluntarily request continued services. For these reasons, and because the family appears to benefit generally from the treatment, the state has recently urged a six-month continuance of the case. Under the Standards, however, the state might well fail to demonstrate by clear and convincing evidence that future harm would occur if court supervision terminated.

III. A Grant of Jurisdiction to Order Removal for Serious Harm

We share with the drafters of the Standards a distaste for removal of the child from the home. Removal must be a remedy of last resort because of its tremendous potential for harm to the child[109] and its total invasion of the parent's right to custody and control. Thus, we approve of the Standards' narrow jurisdictional grant to order removal. Removal is available only if the child has suffered or there is a substantial risk that he will imminently suffer serious harm *and* if it is necessary to protect against future harm.[110] In addition, removal must be the only means of protecting the child.[111] It is because we concur with these severe limitations upon the court's power to order removal that we have urged significantly broader power to order services. Services should be more available because, as even the commentary suggests, services can often remedy a dangerous family situation and thus prevent the need for removal in the future.[112] Therefore, our criticism of the present draft of the Standards

[109] *See* Mnookin, *supra* note 14, at 270-72; Wald, *supra* note 59, at 644-46.
[110] IJA/ABA Standards pts. 2.1 & 2.2.
[111] *Id.* pt. 6.4(C)(1)(2).
[112] Commentary 118; *see* Mnookin, *supra* note 14, at 272; Wald, *supra* note 59, at 647-48.

has focused upon the unwise limitations upon the power of courts to order services. However, we do suggest certain amendments to the present removal scheme. First, courts should have the power to remove a child suffering serious physical harm, even though the harm is caused by environmental conditions beyond the parent's control. Second, courts should have the power to extend parental rights to a removed child beyond the termination date required by the Standards, if the agency or the parent presents clear evidence of the parent's progress toward the goal of reunification of the family.

A. *Removal in Cases of Serious Physical Harm Caused by Environmental Conditions*

The commentary to the Standards declares that the only purpose of court-ordered intervention is "to protect the child from future harm, not to punish parents or to provide ongoing supervision of families where the child is endangered."[113] To further this purpose, the Standards condition all court intervention primarily upon whether the child has suffered harm. This condition is deliberately intended to shift the focus away from an examination of parental fault.[114] The commentary suggests that a court can intervene when a child has suffered serious physical injuries, even though the cause is unexplained and the parents' responsibility remains unproven.[115] Consistent with this emphasis on harm rather than parental fault, the commentary states that a court may intervene when the child's injuries are a result of the parent's mental illness, alcoholism, or drug addiction. The commentators offer this suggestion with the explicit awareness that these problems are often beyond the parent's control and are a result of social conditions.[116]

There is, however, one instance in which the Standards depart from this principle of intervention for harm without regard to parental fault.[117] A court is specifically prohibited from ordering removal of a child suffering serious harm caused by environmental conditions that are beyond the parents' control.[118] If the parents are willing but unable to remedy such conditions, a court cannot order removal regardless of the quantum of danger to the child. Yet the Standards do permit a court to order *services* in this situation,[119] despite the commentary's general disapproval of any coercive intervention to remedy "societal neglect." The only apparent reason for this inconsistency is that the drafters recognize that a court order may be a necessary precondition to delivery of services requisite to correct dangerous conditions.

We disagree with this departure by the Standards from its own princi-

[113] Commentary 63.
[114] *Id.* at 39.
[115] *Id.* at 53; *see* Paulsen, *supra* note 50, at 157.
[116] Commentary 53.
[117] *Id.* at 55.
[118] IJA/ABA Standards pt. 6.4(C)(4).
[119] Commentary 54-55, 128-29.

ple of disregard of parental fault.[130] We share the commentators' reluctance to punish parents and invade their fundamental right to raise their child when "societal neglect" is the real culprit. The parents are as much victims of their poverty as are the children. If the Standards had selected punishment as the goal, intervention in cases of faultless parents would be clearly inappropriate. However, because that goal was rejected and protection alone was adopted, such intervention will be warranted in some cases. As unfair as removal is to the parents, failure to remove may cause serious harm, even death, to the child. Thus, failure to remove the child from harm because of the parents' innocence is contrary to the Standards' explicit recognition that the child's interest must supersede the parents'.[131]

The Standards predicate removal on harm to the child and, in general, embrace this principle without regard to the family's socioeconomic level. Children of the poor are no less deserving of state protection to assure their safety than are children of the affluent. Yet, in recognizing the necessity of intervention in cases of serious harm, the Standards concede that such intervention is likely to occur more often in low-income families.[132] Data have established a significant correlation between poverty and neglect[133] and have suggested a more disputed correlation between poverty and abuse.[134] Even if this causal link is refuted, harm to poor children is more likely to be discovered because all aspects of the lives of poor families are subject to the constant scrutiny of public clinics and welfare workers.[135] Intervention because of the parent's mental illness, alcoholism, or drug addiction, which the commentary declares permissible, gives rise to similar class disparities in enforcement. A poor parent laboring under one of these disabilities is more likely to come to the attention of state authorities. Moreover, these disabilities may often be a result of the parent's poverty.[136] Apparently, the Standards tolerate intervention

[130] *Accord*, IJA/ABA Standards 183 (Nuernberger, dissenting).

[131] *Id.* pt. 1.5; Commentary 45.

[132] *See* Dembitz, Child Abuse and the Law—Fact and Fiction, 24 Record of N.Y.C.B.A. 613, 623 (1969); Sussman, Reporting Child Abuse: A Review of the Literature, 8 Fam. L.Q. 245, 262 (1974). Professor Michael Wald, co-reporter of the Standards, has similarly suggested that the system's discrimination against the poor and its failure to provide services pending removal of the child should not prohibit temporary or permanent placement of the child when necessary. Wald, *supra* note 59, at 692 n.269.

[133] *See, e.g.*, A. Kadushin, *supra* note 15, at 246-47; S. Katz, *supra* note 9, at 24-25; Boehm, The Community and the Social Agency Define Neglect, 43 Child Welfare 459 (1964).

[134] *See, e.g.*, D. Gil, *supra* note 1, at 113, 129, 136 (suggests link between poverty and abuse). *But see* A. Kadushin, *supra* note 15, at 250 (suggests more random distribution, abuse related to personality factors); Light, Abused and Neglected Children in America: A Study of Alternative Policies, 43 Harv. Ed. Rev. 556, 562-67 (1973) (questions validity of Gil's statistics); Newberger & Daniel, Knowledge and Epidemiology of Child Abuse: A Critical Review of Concepts, 5 Pediatric Annals 140 (1976) (same).

[135] S. Katz, *supra* note 9, at 28-29; *see* Areen, Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases, 63 Geo. L.J. 887, 892-93 (1975) (suggests that professionals may inject social class bias into diagnosis of cause of injury); Paulsen, Juvenile Courts, Family Courts, and the Poor Man, 54 Calif. L. Rev. 694 (1966).

[136] S. Katz, *supra* note 9, at 25.

when poverty is an indirect cause of harm but not when it is a direct cause.[127] This distinction is without substance and merely disguises the disturbing reality that the state will continue to intervene more often in poor than nonpoor families.

Situations requiring removal despite the parent's innocence will be extremely rare. In the vast majority of cases, services will solve the problem. In particular, the new approach to treatment that focuses upon the family's external needs is likely to increase the success rate of services.[128] For example, if a child is not receiving proper nourishment because of the parent's meager financial resources, food stamps would provide an easy remedy. If a child is suffering from rat bites or lead paint poisoning, the parents or state housing and health officials could file complaints against the landlord in court;[129] if necessary, new housing could be found.[130] If a child is continually suffering severe beatings at the hands of neighborhood gangs, and if the police were unable to prevent these incidents, the entire family could be moved out of the area.

If parents refuse to move out of an unsafe neighborhood or home, a court has the power to order removal of the child under the Standards. However, even if the parent is willing, no public housing may be available at that time. Even though the child cannot otherwise be protected from very serious physical harm, a court does not have the power to remove the child under the Standards. We suggest that a court should be able to order temporary removal until safe housing is found. We cannot conceive of an analogous case in which permanent removal would be necessary. Removal here is simply a stopgap measure until the inadequacy of the community's provision of shelter is remedied.

In addition to limitations upon the duration of removal in these cases, limitations upon the type of harm triggering removal should be imposed. Obviously, massive relocation of families because their children suffer the typical, terrible harms of urban blight and poverty cannot be achieved under the child protection power. To permit removal on the basis of environmental conditions, the harm must be even more severe than in normal instances of removal. Removal should also be restricted to cases of actual physical harm. Because of the indefinite nature of emotional harm, its identification entails subjective, value-laden judgments,[131] and the attendant danger that removal will become a wholesale weapon against the poor is too great. Similarly, the child must actually be suffering or must recently have suffered serious physical harm; a substantial risk of imminent harm should not be sufficient. The inherent uncertainty of predic-

---

[127] For discussion of poverty as an indirect cause of neglect, see Wald, *supra* note 59, at 692 n.268.

[128] *See* notes 76-77 and accompanying text *supra*.

[129] Morse, Hyde, Newberger & Reed, *supra* note 69, at 5.

[130] *See, e.g., id.* at 7.

[131] *See* Commentary 56.

tive judgments, especially in the absence of past harm,[133] offers too many opportunities for injection of class biases.

Because the Standards predicate removal on whether the harm was caused by parental neglect or by environmental conditions beyond the parent's control, the petitioner would have an additional element to prove.[133] Apparently, the petitioner would have to show either that environmental conditions did not cause the harm, or, if they did, that the parent was unwilling to take the steps necessary to correct them. Unfortunately, the boundaries of parental control are not distinct.[134] Thus, the remedy of removal may be unduly denied in many cases of parental neglect because the petitioner has failed to satisfy his burden of proof.

We offer an illustration from our clinical files of how a single family history may present conflicting evidence of parental control. A mother gave birth seven weeks prematurely to a three-pound nine-ounce son. The infant remained in the Hospital one month because of lack of oxygen at birth, bloody stools and mild jaundice. After discharge from the Hospital, the infant was scheduled to have pediatric follow-up on a biweekly basis, but the mother failed to keep the appointments at a community health center. Two months passed before a visiting nurse found the mother and child at home. During the visit, the mother seemed depressed and complained about poor housing conditions. The nurse wrote in her notes: "Living room was completely dark despite the bright sunshine . . . dirty dishes were piled in the sink, dirty clothes on the floor . . . roaches were observed in the infant's crib." The nurse further noted that the mother did not interact with her youngster. The mother described herself as a good caretaker and her son as "slow." Examination revealed that the infant's physical development was in fact well below average; on the growth chart, the child was below the third percentile for height, weight and head circumference. The mother continued to miss appointments at the clinic. During the appointments she did keep, the staff observed that the infant seemed apathetic; he offered little response to his social environment and had made few developmental gains. At the clinic, the infant repeatedly drank four to eight ounces of water, an indication of hunger. When questioned about her son's eating habits, the mother replied that baby food and milk were too expensive on her welfare allowance. Although this case would probably not require removal to protect against harm,[135] it manifests the difficulties in discerning whether the poor hous-

---

[133] *See* Wald, *supra* note 46, at 1003-04 & n.109.

[133] *See* IJA/ABA Standards pt. 6.4(C)(5) (burden of proof on those advocating removal on all issues).

[134] *See generally* Morse, Hyde, Newberger & Reed, *supra* note 69.

[135] Removal might be an appropriate remedy in this case even though the Standards' requirement that it be the only means to prevent future harm would not necessarily be satisfied. IJA/ABA Standards pt. 6.4(C)(1)(2); Commentary 125. A combined showing of the distinct possibility of specific harm and the incidence of an acute mental or physical crisis in the parent's life could conceivably justify removal for a very short time limited to the period of crisis. The stress brought on by divorce, death in the family, severe illness—perhaps even

ing conditions and the child's poor nutrition were a result of the family's inexorable poverty or the mother's neglect. However, the present draft of the Standards would require courts to determine if the mother was at fault. Such an inquiry is not only impractical but also contrary to the Standards' focus upon prevention of harm.

B. *Termination of Parental Rights*

Once the child is removed, the Standards permit the child's need to achieve stability and continuity in parenting[136] to dominate efforts to reunite the family. The Standards provide for automatic termination of the parents' rights if the child cannot safely be returned home at the end of a specified period of time. The court must terminate parental rights at the end of six months of foster care if the child is under three at the time of placement, and at the end of one year if the child is over three.[137] This represents a reversal of the priorities the Standards mandate for return of the child after shorter periods of removal.

In effect, this termination provision codifies two generalizations. First, the Standards assume that, as time passes, children are likely to form strong new parental attachments while the old ones weaken. Second, the Standards assume that the number of families in which the danger of harm has subsided sufficiently to permit the child's return decreases over time.[138] To limit judicial discretion and avoid unnecessary extensions of this harmful limbo, the Standards select an arbitrary deadline for termination.

The Standards do, however, provide some room for judicial discretion. The parent's rights will not be terminated if the court finds by clear and convincing evidence that the case fits within one of the exceptions provided.[139] The most important exception requires the court to extend the parent's rights if, "because of the closeness of the parent-child relationship, it would be detrimental to the child to terminate parental rights . . . ."[140] Thus, the parents have an opportunity to rebut the first generalization of the Standards concerning the progressive weakening of

---

the immediate weakened condition of the mother in this case after a difficult birth—may make the parent less able to cope with the demands of child rearing at that time. This added strain, along with a child's illness or the parent's lack of understanding of child development, are all contributing factors to abuse. Temporary removal at the time of crisis could avert future harm. *Cf.* Holmes, Barnhart, Cantoni & Reymer, *supra* note 47, at 11. However, even a brief period of separation of a child from the mother may disrupt the bond of attachment and result in subsequent developmental disability. Klaus & Kennell, Mothers Separated from Their Newborn Infants, 17 Pediatric Clinics of North America 1015 (1975); Sameroff & Chandler, Reproductive Risk and the Continuum of Caretaking Casualty, *in* Review of Child Development Research (F. Horowitz ed. 1975). Thus, temporary removal to relieve the stress of an acute crisis should be the exception and not the rule.

[136] IJA/ABA Standards pt. 1.6.

[137] *Id.* pts. 8.3(A) & (B).

[138] *Cf.* Commentary 155; N. Polansky & N. Polansky, *supra* note 68 (return after abuse, a rare exception).

[139] IJA/ABA Standards pt. 8.4.

[140] *Id.* pt. 8.4(A).

attachments to the old parents. However, the Standards do not provide a similar opportunity to rebut the second generalization concerning the progressive failure of rehabilitation. Our clinical experience indicates that, because enough instances of rehabilitation occur over periods longer than the Standards recognize, another exception is warranted.[141] Six months to a year is often insufficient time for an agency to induce significant attitudinal and behavioral improvements and for the court and the agency to evaluate the family's caretaking capacity and the potential safety of the home.[142] The agency providing services to the parents or the parents themselves should have an opportunity to submit evidence of substantial progress. If no significant evidence is presented, the court should terminate the parents' rights. This opportunity to rebut the Standards' presumption that the family cannot be safely reunited in the near future is demanded by the Standards' express goal of revitalizing and reuniting the family[143] and by the absolute nature of the court's contemplated action.

Even if this exception for progress in treatment were to be incorporated, there would still be substantial dangers in the termination scheme. Courts will be aware of the possible consequences of a finding of neglect or abuse and of a decision to remove the child. Quite naturally, if one likely consequence is the automatic termination of the parents' rights, courts might hesitate in making the initial finding or in ordering removal even in cases that warrant both steps.[144] Particularly when the substantive rules in this area are by nature elusive, courts will often be able to characterize the same set of facts as either sufficient or insufficient grounds for jurisdiction or removal. Thus, this termination scheme might result in a court finding either that fewer cases are within its jurisdiction or appropriate for removal, or that more cases are within the exceptions to automatic termination. If the former were to occur, many suffering children would be deprived of state protection. If the latter were to occur, the termination provision's limitations upon judicial discretion would amount to a confusing fiction. To avoid these results, the Standards should simply call for review every six months regarding the advisability of continuing the parents' rights and the possibility of return. The Standards should guide the judge's discretion by listing relevant factors, such as the closeness of the natural parents and the child and the progress the family is making toward a safe return. Admittedly, this open-ended review might result in some harmful postponements of the inevitable break.[145] In exchange, however, this arrangement could prevent some untimely and tragic terminations of parental rights.

[141] *Accord*, N. Polansky & N. Polansky, *supra* note 68 (predicts years rather than months before a severely neglected child can be safely returned home).

[142] Clinicians have noted pseudo-rapid improvement by parents in treatment. Pollock & Steele, *supra* note 106, at 17. This progress could mask the more enduring problems unless observation is continued for an extended period of time.

[143] IJA/ABA Standards pt. 1.5.

[144] Paulsen, The Legal Framework for Child Protection, 66 Colum. L. Rev. 679, 699-700 (1966); Wald, *supra* note 59, at 675-76.

[145] *See* Mnookin, *supra* note 14, at 281.

IV. Revision of the Pre-Court Involvement in the Family: The Reporting Process

The major contemporary reform of the child protection system has been the nationwide enactment of mandatory reporting of child abuse.[146] The Standards have proposed a reporting mechanism that is consistent with the drafters' emphasis upon preventing unwarranted intrusions into the family. The Standards impose a duty upon professionals, including medical personnel, educators, childcare workers, social workers and law-enforcement personnel, to report cases of serious physical abuse.[147] Failure to report by designated professionals constitutes a misdemeanor and gives rise to civil liability.[148] The Standards provide these professionals with immunity from civil and criminal liability in cases in which they report in good faith.[149] Under the reporting scheme, the professional files the report with a designated agency—the report recipient agency.[150] That agency initiates a limited investigation,[151] files notice of the report with a central registry[152] and may file a court complaint.[153]

Surprisingly, the type of harm that must be reported—serious physical abuse—is narrower than the type of harm that constitutes grounds for court intervention. Additionally, the power of the report recipient agency to investigate the report before a complaint is filed in court is more limited than the agency's power to investigate after filing. Thus, the Standards have failed to recognize that outside intervention in the form of reporting is far less intrusive[154] and results in far less stigma to the parents than court action.[155] In adopting this narrow reporting provision, the drafters have again failed to exploit the opportunity to prevent very intrusive state intervention in the future by increasing the availability of less intrusive means of intervention. Reporting can prevent the need to file court action because the agency may discover upon intervention that the child was not abused or that intervention is unnecessary. Moreover, to the extent that it manifests or perhaps prompts the concern of persons outside the home,[156] the report may be the catalyst for voluntary improvements in the family situation.[157] Accordingly, we suggest that the reporting scheme be significantly expanded.

---

[146] Commentary 65.
[147] IJA/ABA Standards pts. 3.1(A) & (B).
[148] *Id.* pt. 3.1(D).
[149] *Id.* pt. 3.1(C).
[150] *Id.* pt. 3.2(A).
[151] *Id.* pt. 3.3(A).
[152] *Id.* pt. 3.4.
[153] *Id.* pt. 3.3(C).
[154] For a graphic illustration of the different magnitudes of intrusion resulting from reporting and court intervention, see A. Schuchter, Child Abuse Intervention 74 (1976).
[155] Burt, *supra* note 33, at 1270.
[156] *See* A. Kadushin, *supra* note 15, at 240-41.
[157] *See, e.g.*, S. Katz, *supra* note 9, at 30-33 (case study).

A. *Permissive Reporting*

The reporting provision of the Standards addresses only mandatory reporting. Nonprofessionals are explicitly exempted from a duty to report. Yet nonprofessionals, such as neighbors, friends, or relatives, have the most intimate, unguarded contact with the family and thus can frequently discover abuse before professionals. The commentary states that the Standards implicitly adopt "permissive" reporting by nonprofessionals.[158] Because of their superior knowledge, these persons must be more actively encouraged to come forward.[159] However, we do not favor mandatory reporting because it would give rise to difficulties in policing and to destructive interference with intimate relationships among friends and relatives. Rather, the Standards should explicitly provide that these persons are encouraged to report, that they will receive a good faith immunity and that their reports will trigger the Standards' agency process.[160] It is important that the Standards clearly establish permissive reporting because the authority of the commentary will vary with the scope of each state's enactment. In addition, explicit recognition of permissive reporting would force the Standards to establish mechanisms to control the increased likelihood of malicious reporting. Presumably, nonprofessionals are more likely than professionals to misuse the reporting system, possibly as a means to malign their acquaintances or relatives. Accordingly, the Standards should establish civil or criminal liability for malicious reports and should require the recipient agency to question the nonprofessional reporter with particular care during the investigation.[161]

B. *Reporting Neglect*

The present draft limits mandatory reporting to cases involving abuse. Only serious physical harm inflicted nonaccidentally must be reported.[162]

---

[158] Commentary 65.

[159] Lucht, Providing a Legislative Base for Reporting Child Abuse, *in* Fourth National Symposium on Child Abuse, *supra* note 41, at 54-55. A survey indicated that 45.6 percent of neighbors that learn of an incident of abuse would report it to the local welfare agency. D. Gil, *supra* note 1, at 63. In a close-knit community, the censure of neighbors, relatives and friends has traditionally operated as the primary tool of social control over parental misconduct. A. Kadushin, *supra* note 15, at 223. The reporting system should promote that social mechanism because it is effective in preventing misconduct and because it incorporates local values.

[160] Six states have adopted this combination of mandatory and permissive reporting. *See* V. DeFrancis & C. Lucht, Child Abuse Legislation in the 1970's, at 22-23 (1974). New York explicitly enacted permissive reporting to curb the practice of the state social services agency of refusing to process all nonmandatory reports. Select Comm. on Child Abuse, N.Y. State Assembly, *supra* note 56, at 234. Processing through the reporting system triggers the dual advantages of prompt agency action and filing in the central registry. Admittedly, the utility of the central registry to track families is in dispute. Whiting, The Central Registry for Child Abuse Cases: Rethinking Basic Assumptions, 56 Child Welfare 761, 763 (1977) (not effective). *Contra*, Freedman, The Need for Intensive Follow-up of Abused Children, *in* Helping the Battered Child and His Family, *supra* note 41, at 85. Two recent proposals for reporting legislation have also expressly advocated permissive reporting by nonprofessionals. Child Abuse and Neglect Project Educ. Comm'n of the States, *supra* note 96, pt. III; *id.* at 16-17 (commentary); A. Schuchter, *supra* note 154, at 111.

[161] Lucht, *supra* note 159, at 54-55.

[162] IJA/ABA Standards pt. 3.1(B).

Nonphysical, nonabuse categories of "endangerment" that are included in the jurisdictional grant are explicitly excluded from the reporting scheme.[163] Neither the Standards nor the commentary clarify whether permissive reporting of nonabuse endangerment will trigger the advantages of mandatory reporting, including immunity, agency processing and central registry. If the excluded categories of endangerment cannot be processed through the reporting system, the Standards would effectively make filing a complaint in court the exclusive route for bringing these harms to the attention of authorities.

The Standards never explain this apparent preference for processing allegations of nonabuse endangerment through the courts. Indeed, because of the publicity and stigma associated with juvenile courts, this preference seems antithetical to the Standards' concern for the interests of the parents. Under the provisions for court proceedings, anyone may file any complaint of harm[164] and receive good faith immunity.[165] An "intake processing agency" of the court screens the complaint and, without a hearing, orders either dismissal, judicial disposition, or referral to a report recipient agency.[166] Thus, an allegation of nonabuse endangerment is acted upon initially by an intake processing agency rather than a report recipient agency.[167]

We disagree with this utilization of the intake agency in cases of nonabuse endangerment. The qualifications of the intake agency are never articulated in the Standards. In contrast, the Standards institute quality control of the report recipient agency, outlining criteria that an agency must satisfy to become a "qualified" agency and providing for its disqualification if the agency later proves inadequate.[168] The only controls on the intake agency are through the promulgation of guidelines for disposition of complaints[169] and through judicial review.[170] The guidelines do not necessarily guarantee intelligent or competent handling of cases. A report recipient agency, which has direct contact with families and is in the business of providing services and investigating these types of cases, is better able to evaluate the existence and cause of harm and the need for and availability of intervention.[171] An illustration of the incompetency of some intake officials is furnished by an extreme case from our clinical files. A mother brought her eight-year-old child, his body covered

---

[163] Commentary 65-66.
[164] IJA/ABA Standards pt. 5.1(A)(1).
[165] *Id.* pt. 5.1(A)(3).
[166] *Id.* pt. 5.1(B).
[167] *See* A. Schuchter, *supra* note 154, at 56 (suggests that public health agency act as the primary screener of reports and that medical institution act as the primary gatekeeper to the courts, rather than relying upon law enforcement or judicial personnel); *cf.* Paulsen, *supra* note 50, at 169.
[168] IJA/ABA Standards pts. 3.2(B) & (C); Commentary 71, 75.
[169] IJA/ABA Standards pt. 5.1(B)(3).
[170] *Id.* pt. 5.1(B)(4).
[171] *Id.* pt. 5.1(B)(2)(a)-(c).

with bruises, to Children's Hospital. The mother admitted that she had hit her son and that she still had an uncontrollable urge to hurt him. She asked that the child be temporarily placed outside the home. Because no voluntary foster placement was available, the Hospital attempted to initiate a care and protection petition in court. The clerk refused authorization of the petition because it was Christmas and "every child belongs with his mother."

Clearly, guidelines for and judicial review of the officer's decision would be ineffective to protect the child from immediate harm in the above case. In addition, the scope of judicial review of the intake officer's action may not be broad enough under the Standards to provide adequate safeguards against abuse of discretion. Apparently, the Standards provide for appeal only of an intake officer's disposition of a sufficient complaint—either dismissal, judicial disposition, or referral to an agency. The language of the Standards suggests that no appeal may be taken from an officer's dismissal of a complaint based upon a finding of insufficiency.[172] Given the necessarily ambiguous grounds for court intervention, an officer could easily abuse his power to dismiss complaints because of insufficiency. In that case, the petitioner is left without recourse. Therefore, we not only urge that the initial screening task be delegated to the more qualified report recipient agency, but also suggest that a person filing a complaint have the right to judicial review of an intake official's determination of insufficiency.

The deliberate omission of neglect from the mandatory reporting system is the most distressing aspect of the Standards' reporting provision.[173] Initially, the commentators cite the systematic bias of reporting against poor and minority families as a justification for the omission.[174] They make the simplistic calculation that the broader the scope of reporting, the greater the effect of this bias. However, the authors themselves note that this bias infects the reporting of abuse.[175] In fact, they admit that no evidence suggests that permitting reporting of neglect has aggravated the class and race disparities of reporting.

The Standards enumerated three additional reasons for refusing to include child neglect among the harms that must be reported. First, the Standards cite the present inadequate availability of services.[176] Second,

---

[172] *Compare id.* pt. 5.1(B)(1) ("disposition" of a sufficient complaint) *with id.* pt. 5.1(B)(4) (appeal of agency's "disposition").

[173] Only eleven states do not require reporting of neglect in any form. Katz, Howe & McGrath, Child Neglect Laws in America, 9 Fam. L.Q. 1, 63 (1975).

[174] Commentary 66; *see* Levine, *supra* note 40, at 4-5.

[175] *See* Areen, *supra* note 125, at 888.

[176] Commentary 66-67. It is indeed "foolish business" for legislatures to require reporting but fail to provide adequate funds for services following a substantiated report. Paulsen, Child Abuse Reporting Laws: The Shape of Legislation, 67 Colum. L. Rev. 1, 3, 49 (1967); *see* DeFrancis, *supra* note 41, at 143-45. Rather than designing an inadequate reporting system, however, the Standards' drafters should adopt a comprehensive system that is not circumscribed by meaningless distinctions between neglect and abuse. At the same time, the system should incorporate in its design a mandate for legislative commitment to services For

it is suggested that including neglect within the reporting system potentially damages the opportunity for successful psychotherapy. The final reason advanced in support of the narrow reporting scheme is the fear that reporting will become a legislative "panacea" that merely substitutes for a meaningful commitment of resources.[177] Significantly, none of these justifications applies exclusively to cases involving child neglect; rather, each applies equally to cases involving child abuse. Thus, because the Standards mandate reporting only in cases of abuse, we must conclude that the drafters believe that abuse is more harmful than neglect. In fact, the commentators do imply that abuse is more damaging.[178] No sound distinction can be premised upon supposed differences in the danger to the child in cases of abuse rather than neglect.[179] Indeed, a child's life can be equally, and frequently even more, endangered by parental neglect.[180] If such a distinction is valid, it is surprising that the Standards treat neglect and abuse identically in the jurisdictional grant.[181] Although a child can be removed from his home based upon parental neglect, a professional who becomes aware of that neglect need not report it. Thus, the Standards again seem to encourage the more intrusive form of state intervention.

Because of both the equivalent danger to the child from neglect and the reporting system's potential for avoiding the need for court intervention, we suggest including neglect as a proper subject of mandatory reporting.[182] The Standards should be revised to provide explicitly that a report of neglect will be protected by the good faith immunity, will be recorded

---

example, the Standards could create a right to services in the parents that is triggered by a substantiated report and that is judicially enforceable. In addition, if the report recipient agency failed to respond with the necessary investigation and provision of services within a specified time, a court could order the destruction of the report and any record of it in the central registry.

[177] Commentary 66-68.

[178] *See id.* at 67 (dangers of abuse sufficient to override risk of harm to therapy relationship between parents and reporter).

[179] Paulsen, *supra* note 50, at 164-65 (need to report malnutrition due to parental inattention equivalent to need to report abuse).

[180] Note, An Appraisal of New York's Statutory Response to the Problem of Child Abuse, 7 Colum. J.L. & Soc. Prob. 51, 52 (1971). For a horrifying description in words and pictures of deaths of and severe injuries to children due to parental neglect, see Weston, *supra* note 96, at 69-74.

[181] IJA/ABA Standards pt. 2.1. However, the Standards do distinguish abuse from nonabuse in the level of proof required to support a disposition of removal. *Id.* pt. 6.4(C)(1) (abuse—preponderance of the evidence); *id.* pt. 6.4(C)(2) (nonabuse—clear and convincing evidence). However, this distinction is based upon the more speculative nature of predictions about future harm in neglect cases and, more importantly, the greater likelihood of successful services intervention in the home. Commentary 126. It is not based upon any false distinction in the severity of harm.

[182] *Accord,* Child Abuse and Neglect Project Educ. Comm'n of the States, *supra* note 96, pt. II(2); Lucht, *supra* note 159, at 50 (supports reporting neglect); Paulsen, *supra* note 50, at 164-65 (supports reporting of malnutrition); *see* A. Schuchter, *supra* note 154, at 5 (notes trend toward including neglect in reporting); *cf.* A. Sussman, Reporting Child Abuse and Neglect: Guidelines for Legislation 72 (1975) (notes that recent federal legislation seems to anticipate reporting of both abuse and neglect in state statutes).

in the central registry and will be the subject of prompt agency investigation. As in cases of abuse, nonprofessionals should have the opportunity, but not the duty, to report neglect. Furthermore, the Standards should still impose a duty to report harm resulting from *suspected* neglect. Because of the imprecise nature of neglect, however, professionals should not be subject to criminal liability for failure to report suspected cases. On the other hand, knowing failure to report should subject professionals to civil liability. This modified duty is imposed upon the professional because his repeated contact with these types of cases gives him the expertise requisite to this kind of judgment.

The basic definition of neglect could be imported from the jurisdictional grant and would include harm resulting from "conditions created" by the parents and from the parents' failure to "adequately supervise or protect" the child.[183] For purposes of reporting, neglect could also include failure to provide needed medical treatment, even though the jurisdictional grant only covers the parents' refusal to provide such treatment.[184] By including neglect, the Standards, in effect, would modify the definition of reportable abuse.[185] The Standards presently provide for report of injuries "inflicted nonaccidentally." Conceivably, cases in which the injury was accidental might now be reportable because of the parent's failure to supervise and protect the child against accidents.[186] For example, a one-year-old child ingested a small quantity of bleach from a bottle that the parents had left on the kitchen floor. The youngster was treated at Children's Hospital and released after the staff warned the family of the safety hazards in the home. Less than a month later, the child was again admitted to the Hospital for ingestion of liquid furniture polish "accidentally" left in the living room. The physician filed a report of neglect. This case illustrates the difficulty in drawing the line between accidental and nonaccidental injury.[187] These diagnostic difficulties might well result in many cases in an unwarranted decision not to report.[188] Moreover, the distinction between accidental and nonaccidental injury has no significance with regard to the child's future safety when the accident is part of a pattern of neglect.[189] Thus, the problems involved in reporting only nonaccidental injuries argue in favor of expanding mandatory reporting to include neglect.

---

[183] IJA/ABA Standards pt. 2.1(B).

[184] *Id.* pt. 2.1(E).

[185] *Id.* pt. 3.1(B).

[186] *See* Paulsen, *supra* note 50, at 164 (supports reporting); Sussman, *supra* note 122, at 252 (same).

[187] *Cf.* Gregg & Elmer, Infant Injuries: Accidents or Abuse?, 44 Pediatrics 434 (1969).

[188] Daly, *supra* note 34, at 319; Paulsen, *supra* note 176, at 49; Wald, *supra* note 46, at 1010 & n.135.

[189] *See* V. Fontana, Somewhere a Child Is Crying 23-29 (1973) ("maltreatment syndrome"); Newberger, The Myth of the Battered Child Syndrome, 40 Current Medical Dialogue 327 (1973), *reprinted in* Annual Progress in Child Psychiatry and Child Development, 1974, at 569 (S. Chess & A. Thomas eds. 1975).

C. *Expanding the Definition of Reportable Abuse*

The Standards require reporting of actual abuse only.[190] Professionals are not required to report cases in which no serious harm has yet occurred, even if there exists a "substantial risk that a child will imminently suffer" serious harm. Thus, mandatory reporting of abuse will occur significantly later in the family history than will court intervention. In addition, the gravity of harm that triggers a report is the same as the gravity required for court intervention; the injury must cause or risk causing "death, disfigurement, impairment of bodily functioning, or other serious physical injury." Both the narrower time factor and the identical level of harm frustrate the primary purpose of reporting and ignore its less intrusive nature. Ideally, reporting should operate as an early warning system. Child abuse can take the form of a single traumatic injury, but a more typical pattern is a series of attacks that escalate in severity.[191] Reporting should be directed toward identifying the early harbingers of more severe injury so that agencies can provide assistance on a voluntary basis and avert both the need for court intervention and the danger of infliction of more serious harm.[192] Thus, the same reasons for allowing court intervention for nonserious harm have added force in the context of a warning system.

Ironically, the Standards design a warning system that excludes mandatory reporting of imminent harm. Apparently, a professional would not even be required to report an unsuccessful attempt at abuse. We frequently encounter cases of attempt at Children's Hospital. For example, a mother brought her child to the Hospital because the father had thrown a glass vase at the toddler. Fortunately, the child was unhurt, but that fact did not prevent the social service worker from filing a report. Protection of a child should not hinge upon his luck.

In fact, the commentary cites the example of an unsuccessful attempt as reason to include imminent harm in the jurisdictional grant, despite the increased danger of unwarranted intervention when no actual harm has occurred.[193] A fortiori, these identity dangers are outweighed when the type of state intervention—reporting—has substantially less intrusive effects upon the family. In providing a recipient agency with discretion to file a court complaint based upon a report, the Standards clearly contemplate that reporting will not necessarily result in court action.[194] Thus, the intrusive nature of reporting is distinct from that of its possible but not inevitable consequence—court action.[195] Reporting will involve agency

[190] IJA/ABA Standards pt. 3.1(B).

[191] *See* note 96 *supra*.

[192] Child Abuse and Neglect Project Educ. Comm'n of the States, *supra* note 96, pts. II(2) & (3); *id.* at 13-14 (commentary); *see* Daly, *supra* note 34, at 318, 343; McCoid, The Battered Child and Other Assaults upon the Family (pt. 1), 50 Minn. L. Rev. 1, 50-51 (1965). *Contra*, Paulsen, *supra* note 50, at 164.

[193] Commentary 52.

[194] IJA/ABA Standards pt. 3.3(C); Commentary 74-75.

[195] *See* note 154 *supra*.

investigation into the allegations and into the family situation. But, according to the Standards, even that investigation is circumscribed.[196] Any provision of services at this stage would be on a voluntary basis. Furthermore, public access to the report should be forbidden in contrast to the guaranteed public access to the courtroom. Privacy is further safeguarded by the expunction of all unsubstantiated and stale reports.[197] In sum, this limited intrusive effect is outweighed by the unique opportunity reporting offers for preventing abuse and court intervention.

We also suggest that only professionals be required to report imminent harm. A report of imminent harm made by nonprofessionals should not trigger the provision for immunity, investigation and notice to the central registry. The difficult judgment about the likelihood of future harm may be beyond the competency of most nonprofessionals. Additionally, limiting mandatory reporting of imminent harm to professionals would avoid unwarranted or maliciously motivated reporting and would avoid overburdening the report recipient agency with dubious reports.

In one significant respect, the Standards broaden the ground for reporting abuse beyond that for jurisdiction. Abuse inflicted by the "parent(s) or person(s) exercising essentially equivalent custody and control over the child"[198] must be reported, whereas only abuse inflicted by the parent constitutes grounds for court intervention.[199] If abuse is inflicted by a regular nonparent caregiver, the court may be able to intervene because of the parent's failure to supervise or protect the child.[200] Because neglect is omitted from the reporting mandate, a more inclusive definition of the perpetrator of abuse was necessary. However, we think the Standards should have gone further and permitted reporting of abuse inflicted by anyone. A reporter may not be in a position to discover who inflicted the harm and whether an abuser's relationship to the child was that of parental equivalent.[201] If the reporter is required to make that threshold determination, he may incorrectly decide not to report if he is uncertain of the identity and status of the perpetrator. Moreover, the Standards' limitation to those exercising parent-like custody and control might exclude many abusers who have regular access to the child. For example, this language may not require reporting of abuse by the mother's boyfriend, a sibling, or a babysitter, who regularly are in the home but do not necessarily exercise parent-like custody and control.[202] Courts may interpret this language to include only permanent nonparent guardians or relatives. Reporting of all harm without regard to the identity of the

---

[196] IJA/ABA Standards pt. 3.3(B).

[197] *Id.* pt. 3.3(D).

[198] *Id.* pt. 3.1(B).

[199] *Id.* pt. 2.1(A).

[200] *See* Commentary 54 (examples three and four).

[201] *See* Paulsen, *supra* note 50, at 164 (notes problem of identifying wrongdoer; suggests no duty to report if noncaretaker).

[202] Gil's statistics demonstrated that the mother's boyfriend accounted for 17.2 percent of reported injuries and the babysitter for 2.7 percent. D. Gil, *supra* note 1, at 129.

perpetrator is desirable.[203] If the agency discovers that, because of the status of the perpetrator, future abuse is unlikely, the agency will not proceed with court action.[204] Nevertheless, this difficult determination should be made by the agency based upon investigation and not by the reporter.

D. *Expanding the Scope of Agency Investigation*

Under the Standards, a report recipient agency may be called upon to conduct an investigation at two stages of a case—after it has received a report,[205] and after a sufficient complaint has been filed and the court has authorized an investigation.[206] The scope of the second investigation is broader that the first in one significant feature; with court authorization, the agency may take temporary custody of the child to facilitate questioning if the parents have denied the agency access.[207] Conversely, an agency investigating a report cannot examine the most crucial witness and evidence[208]—the child—without first obtaining court authorization.[209] Apparently, to obtain this authorization the agency must file a formal complaint with the court.[210] The commentary suggests that the parents' refusal of access would constitute "reason to believe" that the child was abused and that intervention was necessary. Thus, refusal would provide grounds for filing.[211]

This provision sacrifices an important benefit of reporting—avoiding the need for court action. As previously suggested, court action entails greater publicity, stigma and intrusion into the family's life. The advantage of reporting is that, through preliminary investigation and voluntary provision of services, the number of instances in which court action is necessary can be reduced.[212] By limiting the scope of the investigation at the reporting stage, the agency will be forced to file in order to obtain the information necessary to determine whether court action is appropriate. This dilemma is aggravated by the fact that a lack of information exists in many cases of neglect and abuse. In some cases, the lack of information itself may be a sign of danger. The unavailability of information may be caused by the family's isolation from neighbors and social service agencies,

---

[203] Child Abuse and Neglect Project Educ. Comm'n of the States, *supra* note 96, pt. II(2) (definition of reportable abuse does not specify identity of perpetrator); *cf.* Wald, *supra* note 46, at 1003. *But see* A. Sussman, *supra* note 182, at 67 (reporting of injuries caused by regular caretaker but not occasional paramour).

[204] *Cf.* Wald, *supra* note 46, at 1003 n.109.

[205] IJA/ABA Standards pt. 5.3(A).

[206] *Id.* pt. 5.2(B)(1).

[207] *Id.* pt. 5.2(E)(1).

[208] *See* Schneider, Pollock & Helfer, Interviewing the Parents, *in* Helping the Battered Child and His Family, *supra* note 41, at 62.

[209] IJA/ABA Standards pt. 5.3(B).

[210] *See id.* (reference to court authorization pursuant to the filing of a complaint).

[211] Commentary 74.

[212] *Cf.* Burt, *supra* note 33, at 1285-85 (notes agency's need for widest access to information). *But see* note 214 *infra*.

which is a characteristic of abusing and neglectful parents.[213] Alternatively, the lack of information may suggest that the parents are attempting to avoid detection. The fact that the parents have never admitted the problems to outsiders may also indicate that they have not consciously come to terms with the reality of their conduct. Thus, the net effect of the Standards' limited investigation will be that the agency will file court actions in far more cases than if they could have fully investigated prior to filing.

Admittedly, granting the agency power to compel examination and temporary custody of the child without initial court supervision may subject families to unwarranted intrusions.[214] Great harm to the child may result from questions implicating the child's parents in mistreatment.[215] However, judicial control of agency abuse would continue because the agency would still have to apply to the court for enforcement of its subpoena.[216] Although we concede that such judicial oversight does not eliminate the potential for harm, we doubt the efficacy of the Standards' more rigid court supervision. Courts cannot control the crucial element—the sensitivity of each investigator.[217] In sum, the necessity and usefulness of increased, initial court control is outweighed by the advantages of a full-scale investigation preceding court involvement.[218]

---

[213] S. Katz, *supra* note 9, at 25; Davoren, *supra* note 43, at 140.

[214] For criticism of the Supreme Court's failure to require a warrant for an at-home visit by a welfare worker, Wyman v. James, 400 U.S. 309 (1971), see Burt, *supra* note 33. The author suggests that issuance of warrants in child protection cases be based upon "reasonableness" grounds. *Id.* at 1306-08.

[215] *See* Commentary 100; Wald, *supra* note 46, at 1006. Professor Burt, co-reporter for the Standards, has argued against recognition of a fifth amendment privilege against self-incrimination for the child. Burt, *supra* note 33, at 1288-306.

[216] The problems of delegation of reporting, investigating and prosecuting powers to private agencies is beyond the scope of this article. The commentary suggests that the Standards provide for sufficient state controls to satisfy delegation requirements. Commentary 72.

[217] *See generally* Goldberg, Breaking the Communication Barrier: The Initial Interview with an Abusing Parent, 54 Child Welfare 274 (1975) (techniques for sensitive interviewing).

[218] *Cf.* Paulsen, *supra* note 50, at 169. We have similar doubts about the value of tight court control over the investigation after court action has been initiated. The Standards require court approval of a plan of investigation. IJA/ABA Standards pt. 5.2(C). Binding the agency to its initial plan and forcing the agency to come back for authorization of any new avenues of investigation is both unrealistic and a waste of judicial and agency resources. *See id.* at 182 (Nuernberger, dissenting). Typically, an agency will not be able to identify the sources and means of investigation until after it has commenced an investigation. Prior investigations will be available only when court action was initiated by a report recipient agency. Expansion of the present statutory guidelines for the investigation could substitute for close judicial scrutiny.

Another waste of resources is found in the Standards' provision for the appointment of experts, at public expense, at the request of any party. *Id.* pt. 5.3(B). The expert is intended as "an independent evaluation" of the agency's investigation and recommendations. *Id.* Our experience indicates that experts in child protection proceedings are often counterproductive. The courtroom becomes a forum for the experts to do battle over child protection issues of high emotional charge and based upon underdeveloped theories. The discussion will often stray onto irrelevant conflicts of professional turf, status and prerogative. The phenomenon of "cross-sterilization of the disciplines" also may develop. Frankfurter, Introduction, *in* A. Whitehead, The Aims of Education (1949). Rather than fostering a fruitful

V. Conclusion

Our critique of the Standards attempts to preserve the advantages of the present draft—the focus on harm to the child rather than on the parent's conduct, respect for the family unit, specificity of the statutory language, and restraint on the power to remove a child from the home—while expanding the occasions for state intervention. In our opinion, the Standards fail to appreciate and exploit the different degrees of intrusion into the family caused by reporting, court-ordered services and removal. Additionally, the Standards do not recognize and maximize the prophylactic potential of reporting and the therapeutic potential of services. To correct these errors, our proposal calls for both reporting of cases of nonserious harm and court jurisdiction to order services for children suffering such harm.

The awareness and careful study of the problem of neglected and abused children over the past fifteen years has culminated in a mandate to legislatures to enact broad reforms of the system of state intervention. The Standards present one response. However, the Standards fail to capitalize on this special time when confident and creative rethinking is both needed and desired. At bottom, the drafters were so painfully aware of past mistakes and present limitations that they were unwilling to aim for something better in the future. Instead, their effort is directed solely toward minimizing the harm of state involvement rather than toward promoting the benefits. The negative assumptions of the Standards do not keep pace with the advances in understanding, diagnosis and treatment of harmed children and their parents. We believe the essentially defeatist approach of the Standards is both unwise and unnecessary for legislatures contemplating ways to improve the present system.

---

exchange of information from the many disciplines involved in child protection, each profession too easily resolves its uncertainty by reference to a dubious truth in another. A typical example of cross-sterilization in child protection proceedings is the recommendation of further psychiatric consultation merely to avoid the difficult custody questions before the court. Thus, we suggest that, to avoid the cost of experts, both financial and substantive, the Standards should place more emphasis upon broadening the scope of the agency's investigation; increasing the time, money and care with which the investigation is prepared; and providing for rigorous cross-examination in court of the investigator and his sources of information.